Supreme Court, U. S.
FILED
AUG 24 1977
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1977

No. 77-66

FRANK A. CUGLIATA and
JOHN MORAITES,
Petitioners

v.

STATE OF MAINE
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT FOR THE
STATE OF MAINE

Brief For Respondent in Opposition

CHARLES K. LEADBETTER
ASSISTANT ATTORNEY GENERAL
STATE HOUSE
AUGUSTA, MAINE 04333
ATTORNEY FOR RESPONDENT

WILLIAM R. STOKES
ASSISTANT ATTORNEY GENERAL
OF COUNSEL

IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1977

No. 77-66

FRANK A. CUGLIATA and
JOHN MORAITES,
Petitioners

v.

STATE OF MAINE
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT FOR THE
STATE OF MAINE

Brief For Respondent in Opposition

CHARLES K. LEADBETTER
ASSISTANT ATTORNEY GENERAL
STATE HOUSE
AUGUSTA, MAINE 04333
ATTORNEY FOR RESPONDENT

WILLIAM R. STOKES
ASSISTANT ATTORNEY GENERAL
OF COUNSEL

INDEX

	Page(s)
TABLE OF AUTHORITIES.....	ii - iii
OPINION BELOW.....	1
JURISDICTION.....	2
QUESTION PRESENTED.....	2
CONSTITUTIONAL PROVISION INVOLVED..	2
STATEMENT OF THE CASE.....	3
ARGUMENT.....	8
THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED, BECAUSE THE DECISION OF THE SUPREME JUDICIAL COURT OF MAINE IS IN ACCORD WITH PAST DECISIONS OF THE UNITED STATES SUPREME COURT.	
CONCLUSION.....	18
CERTIFICATE OF SERVICE.....	19

TABLE OF AUTHORITIES

Case	Page(s)
Barber v. Page, 390 U.S. 719 (1968)	11, 14, 15
Brookhart v. Janis, 384 U.S. 1 (1965)	15
California v. Green, 399 U.S. 149 (1970)	9-10, 11
Dutton v. Evans, 400 U.S. 74 (1970)	7, 11, 12, 13, 14, 15, 16
Freeman v. Zahradnick, ___U.S. ___, 97 S.Ct. 1150, 1154-55 (1977) (Marshall, J., dissenting)	13
Mancusi v. Stubbs, 408 U.S. 204 (1972)	15, 16
Mutual Life Ins. Company v. Hillmon, 145 U.S. 285 (1892)	2, 8, 9
Pointer v. Texas, 380 U.S. 400 (1965)	10, 11, 15
United States v. Annunziato, 293 F.2d 373 (2d Cir. 1961)	9
United States v. Pheaster, 544 F.2d 353 (9th Cir. 1976), cert. denied ___U.S.___, 97 S.Ct. 1243 (1977)	9

Case	Page(s)
Commonwealth v. Trefethen, 157 Mass. 180, 31 N.E. 961 (1892)	9
Hunter v. State, 40 N.J.L. 495 (1878)	9
Kennard v. Burton, 25 Me. 39 (1845)	13
People v. Alcade, 24 Cal. 2d 177, 148 P.2d 627 (1944)	9
State v. Cugliata, 372 A.2d 1019 (Me. 1977)	5, 6, 11, 12, 13, 14, 15, 16, 17
MAINE STATUTES	
17 M.R.S.A. §2651	1, 3
TREATISES	
6 Wigmore on Evidence §1725 (Chadburn Rev. 1976)	9
5 Wigmore on Evidence §1397 (Chadburn Rev. 1974)	11
MISCELLANEOUS	
Sup. Ct.R. 19(1)(a)	17
Adviser's Note to Rule 803(3) Me.R.Evid.	14
Rule 803(3), Fed. R. Evid.	9

IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1977

No. 77-66

FRANK A. CUGLIATA and
JOHN MORAITES,
Petitioners

v.

STATE OF MAINE
Respondent

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME JUDICIAL COURT FOR THE
STATE OF MAINE

Brief For Respondent in Opposition

OPINION BELOW

The opinion of the Supreme Judicial Court of Maine, affirming the convictions of the Petitioners of the crime of felonious homicide punishable as murder (17 M.R.S.A. §2651) is reported at 372 A.2d 1019 (Me. 1977), and is reprinted in Appendix A of Petition.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTION PRESENTED

Whether a criminal defendant's Sixth Amendment right to confront the witnesses against him is violated in a state court prosecution for murder where hearsay evidence is admitted at trial, pursuant to the "present mental state" exception to the hearsay rule as recognized in Mutual Life Insurance Co. v. Hillmon, 145 U.S. 285 (1892).

CONSTITUTIONAL PROVISION INVOLVED

Sixth Amendment: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

STATEMENT OF THE CASE

On August 15, 1974, at approximately 6:00 a.m., the dead body of Mr. Vincent Serra was discovered in the vicinity of Route 1 in Nobleboro, Maine. Death was caused by multiple wounds inflicted by shotgun pellets and nine-millimeter bullets fired from two different guns. The evidence established that death occurred sometime between 11:00 p.m. on August 14, 1974 and 3:00 a.m. on August 15, 1974.

On December 20, 1974, a Lincoln County, Maine grand jury returned indictments against the Petitioners charging them with felonious homicide punishable as murder (17 M.R.S.A. §2651). Both Petitioners pleaded not guilty, both were tried before a jury and both were ultimately convicted of the murder of Vincent Serra.

During trial, and over Petitioners' objections, the State was permitted to introduce the testimony of Mr. Albert Wilson concerning a conversation he had with the deceased on August 12, 1974, a few days before the latter died.

> "According to Wilson, Serra was planning to buy 10 pounds of hashish at midnight, August 14, at a place which was near a ship and was approximately a drive of an hour and a half, by automobile, from Medford [Massachusetts]. Serra added that two other people, one of whom was named 'Frank' and both of whom would be armed, were to accompany Serra. Each of the three was to contribute $2,000 toward the $6,000 purchase price of hashish. Serra told Wilson about this plan because Serra was unable to raise his $2,000 share and wanted Wilson to become a participant by providing some of that amount of money. When Wilson agreed to become a participant, he and Serra went to the Medford Savings Bank where Wilson withdrew $1,200 and gave it to Serra (Serra . . . . later withdrawing $800 of his savings to make up the $2,000)."

State v. Cuqliata, 372 A.2d 1019, 1026 (Me. 1977).

Wilson's testimony concerning his conversation with Serra, including the reference to a man named "Frank," was allowed into evidence by the presiding Justice. However, the Justice instructed the jury that it could only consider Wilson's testimony for the purpose of showing

> ". . . an intention in the mind of the decedent to make a trip, and also as bearing upon whether or not in fact he did make such a trip."

Id.

Also admitted into evidence, over Petitioners' objections, was a note written by the decedent and found in his automobile, which read:

> "Split with John Meraides [or Miraides] and Frank Cogliata at 9:00 p.m. 14th of August. In case of no return check them for responsibility carrying $2000.00."

[emphasis supplied]

Only that portion of the note above underscored was seen by the jury, and the presiding Justice again instructed the jury that it

> "was to consider the note only as evidence of Serra's intent to take a trip and of the likelihood that he in fact took the trip he intended to take."

State v. Cuqliata, 372 A.2d at 1026. This limiting instruction was also included in the presiding Justice's final charge to the jury.

The basis of Petitioners' objections to the admissibility of this evidence was that it was inadmissible hearsay under State law and that, in any event, it violated their confrontation rights as embodied in the 6th - 14th Amendments to the United States Constitution.

On appeal, the Supreme Judicial Court of Maine rejected the Petitioners' contentions, on the ground that (1) the evidence was properly admitted pursuant to the

"present mental state" exception to the hearsay rule, and (2) that on the authority of Dutton v. Evans, 400 U.S. 74 (1970), the admission of the evidence did not result in a violation of Petitioners' constitutional rights.

ARGUMENT

THE WRIT OF CERTIORARI SHOULD NOT BE GRANTED BECAUSE THE DECISION OF THE SUPREME JUDICIAL COURT OF MAINE IS IN ACCORD WITH PAST DECISIONS OF THE UNITED STATES SUPREME COURT.

In Mutual Life Insurance Co. v. Hillmon, 145 U.S. 285 (1892), this Court held that a person's out-of-court statements concerning his present intention to do a future act were not barred by the hearsay exclusionary rule and were, therefore, admissible. The evidence involved in Hillmon were letters sent by a man to his family informing it of his intention to take a trip with a certain individual. The Court held that the letters were admissible in a trial occurring after the man's death,

> ". . . as evidence that shortly before the time when other evidence tended to show that he went away, he had the intention of going, and of going with Hillmon, which

> made it more probable both that he did go and that he went with Hillmon, than if there had been no proof of such intention."

145 U.S. at 296.

Although Hillmon was a civil case, the doctrine it announced has been applied to criminal cases as well. See, e.g., United States v. Pheaster, 544 F.2d 353, 375 (9th Cir. 1976), cert. denied, _____ U.S. _____, 97 S.Ct. 1243 (1977); United States v. Annunziato, 293 F.2d 373, 377 (2d Cir. 1961); People v. Alcade, 24 Cal. 2d 177, 148 P.2d 627 (1944); Commonwealth v. Trefethen, 157 Mass. 180, 31 N.E. 961 (1892); Hunter v. State, 40 N.J.L. 495 (1878). See generally 6 Wigmore on Evidence §1725 (Chadburn Rev. 1976). The "present mental state" exception has been codified in Rule 803(3), Fed. R. Evid.

However, the issue confronting this Court is not whether the "present mental state" exception to the hearsay rule is a sound rule of evidence. See California v. Green, 399 U.S. 149, 155 (1970). Rather the issue posed by this petition for certiorari is whether the evidence admitted at Petitioners' State court trial, pursuant to the "present mental state" hearsay exception, denied them their Sixth Amendment right to confront the witnesses against them.

The Sixth Amendment to the United States Constitution provides, in pertinent part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . ."

This constitutional provision has been made obligatory on the States by the Fourteenth Amendment. See Pointer v. Texas, 380 U.S. 400, 403 (1965). While the admission of hearsay evidence against a criminal defendant often raises issues involving the Confrontation Clause, it does not necessarily follow that that

constitutional guarantee requires that all admissible hearsay be excluded. See, e.g., Dutton v. Evans, 400 U.S. 74, 80 (1970); Pointer v. Texas, 380 U.S. at 407 ; See also State v. Cugliata, 372 A.2d at 1030. On the other hand, this Court has also held that Confrontation Clause violations may occur despite the fact that evidence was admitted under a recognized exception to the hearsay rule. See, e.g., California v. Green, 399 U.S. 149, 155-156 (1970); Barber v. Page, 390 U.S. 719 (1968); Pointer v. Texas, 380 U.S. 400 (1965) As indicated by this Court in Dutton v. Evans, 400 U.S. at 86, whether the admission of hearsay evidence against a criminal defendant offends the Confrontation Clause must be determined on the facts of each individual case. See also 5 Wigmore on Evidence §1397 (Chadburn Rev. 1974).

In its opinion below, the Supreme Judicial Court of Maine concluded

> ". . . that the admission in evidence of the Serra conversation with Wilson and the edited version of the Serra note did not violate the confrontation rights of defendants. . . ."

State v. Cugliata, 372 A.2d at 1030. In arriving at its decision, the Maine Court relied upon this Court's decision in Dutton v. Evans, supra.

Dutton involved the admission into evidence of an out-of-court statement made by the defendant's [Evans] co-conspirator to the latter's cellmate at a federal penitentiary. Over defense objections, this cellmate was permitted to testify that Evans' co-conspirator stated: "If it hadn't been for that dirty son-of-a bitch Alex Evans, we wouldn't be in this now." Dutton v. Evans, 400 U.S. at 77. This Court held that the introduction of this evidence was not violative of the defendant's right of Confrontation.

Many of the same factors which led the Dutton Court to reject the defendant's Sixth Amendment claim in that case,[1] are also present here. As pointed out by the Court below, the "present mental state" exception to the hearsay rule has long been recognized in Maine. Although the Maine Supreme Judicial Court never had occasion, prior to this case, to expressly adopt this specific exception, it has been recognized in civil cases for over 130 years. See Kennard v. Burton, 25 Me. 39 (1845), cited in State v. Cugliata, 372 A.2d at 1027. As the Court below correctly pointed out, it has never been "intimated that the applicability of the exception is confined

1. For a brief discussion of the factors considered relevant in cases which present Confrontation Clause issues arising from the admission of hearsay evidence, see Mr. Justice Marshall's dissent from the denial of certiorari in Freeman v. Zahradnick, ___U.S.___, 97 S.Ct. 1150, 1154-55 (1977) (Marshall, J., dissenting).

to civil trials." State v. Cugliata, 372 A.2d at 1027. See also Adviser's Note to Rule 803(3) Me. R. Evid. The fact that a rule of evidence has a long history of acceptance in a particular jurisdiction is a factor to be considered in determining whether its use in a criminal case contravenes Sixth Amendment principles. See Dutton v. Evans, 400 U.S. at 87-88.

Moreover, the circumstances surrounding the deceased's statements in this case (his conversation with Wilson and his note) strongly indicate that they were made voluntarily and were not coerced. State v. Cugliata, 372 A.2d at 1031 citing Dutton v. Evans, 400 U.S. at 87.

Nor did the admission of evidence in this case result in a wholesale denial of the Petitioners' rights of cross-examination. State v. Cugliata, 372 A.2d at 1031 citing Barber v. Page, 390 U.S. 719 (1968). See

also Brookhart v. Janis, 384 U.S. 1 (1965). Neither was there any evidence of prosecutorial bad faith or misconduct. See Dutton v. Evans, 400 U.S. at 87 citing Pointer v. Texas, 380 U.S. 400 (1965). Furthermore, this case is easily distinguishable from Barber v. Page, 390 U.S. 719 (1968), in which this Court found a Confrontation Clause violation as a result of the admission into evidence of a witness's testimony given at a prior proceeding. Central to the Court's decision in Barber was the fact that the government made no attempt to secure the presence of the witness at trial. Here, of course, it was impossible for Serra to testify at trial. Cf. Mancusi v. Stubbs, 408 U.S. 204 (1972). Additionally, it should be noted that, at least with respect to Wilson's testimony, the Petitioners' did have the opportunity to confront and cross-examine him. See Dutton v. Evans, 400 U.S. at 89.

Finally, and perhaps most importantly, there was "abundant corroboration" that the deceased's declarations were both accurate and reliable. State v. Cugliata, 372 A.2d at 1028. Serra's statements to Wilson and the note which he left were completely consistent with each other. Furthermore, the evidence supports the view that what the deceased planned to do he, in fact, did. It is highly unlikely that the deceased would fabricate a story to Wilson, who was not only Serra's lifelong friend, but who was also a participant in the scheme to purchase the drugs. See Mancusi v. Stubbs, 408 U.S. at 413; Dutton v. Evans, 400 U.S. at 87.

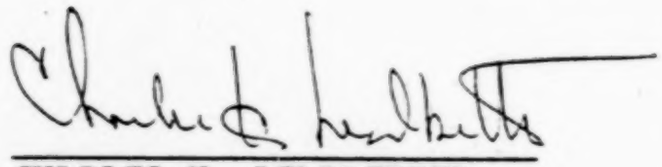
It is apparent that the Petitioners' Sixth Amendment Confrontation rights were not violated by the Maine Court in their trial for murder. The unanimous opinion

of the Maine Supreme Judicial Court adequately addressed the Petitioners' constitutional claims, and properly rejected them. The Court's opinion in State v. Cugliata, 372 A.2d 1019 (Me. 1977), is in accord with past decisions of this Court, and it is respectfully requested that this petition for a writ of certiorari be denied. Sup. Ct. R. 19(1)(a).

CONCLUSION

For the foregoing reasons, it is respectfully requested that the petition for a writ of certiorari be denied.

Respectfully Submitted,



CHARLES K. LEADBETTER
ASSISTANT ATTORNEY GENERAL
STATE HOUSE
AUGUSTA, MAINE 04333
ATTORNEY FOR RESPONDENT

CERTIFICATE OF SERVICE

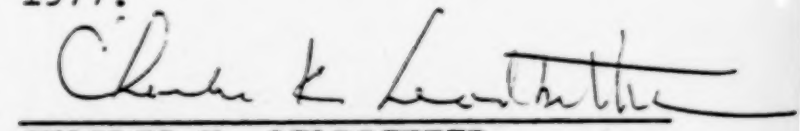
Pursuant to Rule 33 of the Rules of the Supreme Court of the United States, the undersigned, counsel of record for the Respondent, on the date written below, did deposit six copies of the above "Brief for Respondent in Opposition" in the United States Mail in Augusta, Maine, first class postage prepaid, 3 copies addressed to Moraites's Attorneys of Record, to wit -

Henry D. Katz, Esquire
Manuel Katz, Esquire
53 State Street
Boston, Massachusetts 02109

and 3 copies to Cugliata's Attorney of Record, to wit -

Gerald Alch, Esquire
One Center Plaza
Boston, Massachusetts 02108

Dated at Augusta, Maine, this 22nd day of August, 1977.



CHARLES K. LEADBETTER
ASSISTANT ATTORNEY GENERAL
STATE HOUSE
AUGUSTA, MAINE 04333
ATTORNEY FOR RESPONDENT